I. Introduction

Liberty Cable, Inc. ("Liberty") is a satellite master antenna television ("SMATV") company based in New York City. Liberty requests the Federal Communications Commission (the "Commission") to adopt the proposed rule (the "Rule") allowing the use of the 18 GHz Band to connect SMATV systems. In adopting the Rule, the Commission should make clear that (1) SMATV companies can use sufficient spectrum to allow one way transmission of up to 72 channels of video programming; (2) the warehousing of available 18 GHz spectrum by franchised cable companies or others is to be discouraged; and (3) SMATV companies can use the 18 GHz Band to connect SMATV systems without becoming a "cable system" as defined in 47 U.S.C. § 522(6).

II. The SMATV Industry Will Significantly Benefit From the Expanded Use of 18 GHz

Liberty provides SMATV service to large apartment complexes in the New York metropolitan area. Liberty currently has operating SMATV systems in Manhattan and SMATV systems under construction in the other boroughs. Liberty also provides SMATV service to Newport City in Jersey City, New Jersey. Newport City, when completed, will be one of the largest multifamily housing complexes in the United States with over 15,000 dwelling units.

Liberty provides SMATV service to many buildings that have no franchised cable service due to delays in construction or awarding franchises. Liberty also provides SMATV service to

properties already served by franchised cable and thus directly competes with cable. Liberty is actively marketing its SMATV service and plans to provide SMATV service to over 10,000 subscribers by the end of 1990.

Liberty's service is currently limited to buildings with 400 or more units. This limitation is due solely to the expense of the antennas, receivers, amplifiers and decoders needed to provide SMATV service (the "Head End"). The Head End is installed on the property served by the SMATV system. It receives, processes and distributes the C-Band satellite and off-air television signals.

Liberty offers up to forty-four channels of television programming to compete with the local cable companies in the New York metropolitan area. A good commercial grade Head End capable of receiving forty-four channels in New York costs about $100,000.

This cost increases with signal scrambling by the satellite television services. Each time another satellite television service scrambles its signal, Liberty must install additional decoders at a cost of about $4,000 per Head End for each service.

As the cost of Head End equipment rises, the number of subscribers needed to economically support an SMATV capital investment must also rise. A 400 unit building, assuming full occupancy, is the minimum size building in greater New York which can economically support an SMATV system delivering a competitive number of channels.

The New York metropolitan area has millions of multifamily housing units. However, only a very small percentage of those units are in buildings of 400 units or more. Liberty estimates that with the use of conventional Head Ends, it has access to less than 10% of the multifamily housing market in the New York metropolitan area. Liberty's SMATV business is thus limited to the very specific niche of serving subscribers who happen to live in large multifamily buildings.

In addition to the economic constraints, Liberty also encounters physical barriers to the installation of an SMATV Head End. It is not always possible to get an unobstructed line of sight to the satellites, particularly in the forest of high rise buildings in Manhattan. New York City has the highest concentration of microwave traffic in the world. Microwave interference with C-Band antenna reception is a constant problem. And space for the placement of a C-Band dish antenna is always at a premium.

The high cost of receiving and distributing video signals is a major impediment to Liberty's growth and success. If Liberty is to grow and become truly competitive in the New York metropolitan area, these costs must be reduced. Liberty has determined that its future depends on being able to connect its SMATV systems using microwave or laser technology.

In 1983, the Commission gave recognition to the legitimacy of SMATV in In Re: Earth Satellite Communications, 95 F.C.C.2d 1223 (1983), aff'd sub nom., New York State Comm'n on Cable Television v. Federal Communications Comm'n, 749 F.2d 804

(D.C. Cir. 1984) ("ESCOM"). At the time, the Commission stated that one of the purposes of preempting state and local franchising requirements for SMATV was to

> do away with redundant regulation where the marketplace itself operates in the public interest...this lowers the economic and procedural barriers inhibiting unrestricted competitive entry into the satellite field. And it removes the government from one more area where the marketplace can make its own choice....[W]e believe that this decision will encourage direct competition in a specific geographic area.

ESCOM at ¶ 16, 20.

Over the last six years, the Commission's vision of a freely competitive video marketplace has begun to take shape as SMATV has proliferated across the U.S. But the high cost of installing a Head End at each property remains a significant barrier to the expansion of Liberty's SMATV service beyond its small niche of 400+ unit buildings.

The use of 18 GHz to connect SMATV systems could remove the cost barriers to SMATV expansion in large urban areas such as New York. By supplementing or replacing a Head End with 18 GHz transmitters and receivers, the cost of receiving and distributing video signals decreases dramatically. Liberty believes an 18 GHz replacement for a Head End could reduce its capital costs up to $80,000 per system.

As Head End costs decrease, the size of multifamily building that can economically support an SMATV system also decreases. And as the size of the building decreases, there is a

corresponding dramatic increase in the potential market which can be served by SMATV.

Liberty believes that if it can use the 18 GHz Band, Liberty could economically serve buildings with as few as fifty (50) units. If the minimum building size Liberty can serve is 50 units, then Liberty estimates it can have access to over 50% of the metropolitan New York market. The elimination of the physical constraints of C-Band Head Ends, e.g. line of sight problems, will also increase the market opportunities. In short, by using 18 GHz, Liberty's SMATV operations could emerge from a small niche in the video marketplace to become a full scale competitor to franchised cable companies.

Liberty supports the use of the full 18 GHz spectrum by SMATV. It is important to Liberty that 18 GHz be available as a complete replacement for a Head End. Accordingly, Liberty will need immediately to transmit forty-four channels of programming with the opportunity to expand to seventy-two channels as program offerings increase. Full use of the 18 GHz Band will ensure that channel capacity and equipment are available. If the Commission were to limit SMATV to a small segment of the 18 GHz Band, the appropriate equipment and channel capacity could be in short supply. The Commission should also make clear that it will discourage 18 GHz licenses which are not promptly utilized.

III. Municipal Regulation Could Prevent SMATV Use of 18 GHz

There are no technical or economic impediments to the use of the 18 GHz Band by SMATV. The main barrier is the Commission's current restriction on the use of 18 GHz for video distribution. Adoption of the Rule can and should eliminate that barrier.

However, expanding the use of 18 GHz will be a meaningless exercise if SMATV companies are precluded by municipal regulation from using it. Liberty intends to use 18 GHz to connect all of its SMATV systems in the New York metropolitan area. But Liberty is concerned that 18 GHz connections could make the Liberty operation a "cable system" subject to municipal franchise requirements.*

Liberty could use 18 GHz to connect several different properties in New York and New Jersey. But then Liberty could arguably become a "cable system" under 47 U.S.C. § 522(6) subject to municipal franchise requirements because the connected systems are not under common control or ownership. See City of Fargo v. Primetime Entertainment, No. 83-87-47, Dist. N.D. (Slip op. March

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* The Commission is considering this issue in In Re: Definition of a Cable Television System, MM Docket No. 89-35. The Notice of Proposed Rule Making in this rule making proceeding stated that the "outcome of [the Definition] proceeding could affect the use of OFS frequencies for the purposes proposed in this item." The Definition inquiry was started in response to the use of lasers for SMATV interconnection. Unlike lasers, the Commission clearly has the preemptive authority and statutory mandate to allocate the use of the 18 GHz Band. See discussion supra at pp. 8-12. There is no reason why the Commission should await the outcome of the Definition proceeding before making clear that 18 GHz connected SMATV systems are not "cable systems."

28, 1988). Even if Liberty were to limit connections to SMATV systems serving properties under common control or ownership, it still could arguably become a "cable system" because the microwave transmissions cross public streets. See Rollins Cablevue, Inc. v. Saienni Enterprises, 633 F.Supp. 1315 (D.Del. 1986).*

The problem is exacerbated by geography. If Liberty were to interconnect all of its SMATV operations in New York and New Jersey by 18 GHz, Liberty could conceivably be required to obtain, simultaneously, franchises in two different states and several different communities.**

Liberty has inquired about obtaining a cable franchise in New York City only to be told that no new applications are being accepted. The New Jersey Office of Cable Television ("OCTV") has threatened to issue a cease and desist order for Liberty's Newport City SMATV system because some cable goes under privately owned pedestrian sidewalks. OCTV has suggested this placement of cable constitutes a use of "public rights of way." If Liberty's SMATV

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* Both of these Federal Court decisions focused, incorrectly, on the nature of the service provided and not the equipment used. In neither case were microwave signals actually used to connect SMATV systems.

** If a franchised cable company in New York used 18 GHz to connect with a franchised cable company in New Jersey by way of a community antenna relay service ("CARS") license, it would not incur franchise obligations in New Jersey. Nor would the New Jersey cable company need a New York franchise. The use of microwave to distribute video signals has never been a basis for imposing local franchise obligations on the microwave licensee. See discussion supra at pp. 8-10. There is no reason why SMATV companies using 18 GHz should be treated any differently than franchised cable or MDS companies in this regard.

systems become a "cable system" by 18 GHz connections, the franchising hurdles would be insurmountable.

If the Commission were to adopt the Rule without making a clear statement that 18 GHz connected SMATV systems do not need a municipal franchise, then Liberty will probably not use the 18 GHz Band. The costs of litigating whether SMATV systems using 18 GHz require a municipal franchise could exceed the savings realized by using the equipment.

IV. The Commission Should Clearly Preempt State Regulation of 18 GHz Video Interconnection

The Commission has always treated microwave as an integral link in the interstate communications network. The Commission has successfully opposed attempts by state and local regulators to limit federal control of the microwave spectrum through local "franchises" of microwave licensees.

Thus, in Orth-O-Vision, 69 F.C.C.2d 657 (1978), reconsideration denied 82 F.C.C.2d 178 (1980), aff'd sub nom., New York State Commission on Cable Television v. F.C.C., 669 F.2d 58 (2nd Cir. 1982) ("Orth-O-Vision"), the Commission preempted state regulation of master antenna television systems which received video programming by multi-point distribution service ("MDS") microwave transmissions. The Commission said,

> No state may regulate an interstate entity where its regulation would interfere with the reception of interstate radio communications.

Orth-O-Vision at ¶ 23.

The Second Circuit upheld the Commission noting its broad powers under the Federal Communications Act to control radio transmissions. The Court said,

> In 1934 Congress enacted the Communications Act (the "Act") and created the FCC for the purpose of regulating "communication by wire and radio so as to make available...to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service...." 47 U.S.C. § 151. Under 47 U.S.C. § 152(a), Congress directed the FCC to regulate all interstate and foreign communication by wire or radio. 11/ See United States v. Southwestern Cable Co., 392 U.S. [157] at 172-73, 88 S.Ct. at 2002-03 (1968). Moreover, the FCC is empowered to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Congress gave the FCC broad authority, so as to "maintain, through appropriate administrative control, [the federal government's] grip on the dynamic aspects of radio transmission." FCC v. Midwest Video Corp., 440 U.S. [689] at 696, 99 S.Ct. [1435] at 1441 [1979]; quoting, FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138, 60 S.Ct. 437, 439, 84 L.Ed. 656 (1940)....Title III of the Act, 47 U.S.C. § 301 et seq., governs the FCC's authority over radio communications. Congress has instructed the FCC to "encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g), see National Broadcasting Co. v. United States, 319 U.S. 190, 219, 63 S.Ct. 997, 1010, 87 L.Ed. 1344 (1943), and to maintain federal control "over all the channels of interstate and foreign radio transmission." 47 U.S.C. § 301. To carry out its mandate, Congress empowered the FCC to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter ...." 47 U.S.C. § 303(r).

11/ The statutory definitions of "communication by wire" and "communication by radio" include "all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission[s]." 47 U.S.C. § 153(a)(b).

669 F.2d at 64-65.

The Commission again asserted its preemptive jurisdiction over interstate communications in the ESCOM decision. In that proceeding, the State of New Jersey sought to regulate a master antenna television system which received video signals by satellite.* The Commission relied on Orth-O-Vision and the above quoted language from the Second Circuit in preempting local regulation of SMATV. The Commission again stressed the interstate nature of the signals being used to transmit video programming.

> The program signals transmitted in the communications satellites that provide these signals to the receive station on an SMATV system are inherently interstate in nature and subject to federal regulation and preemption.

ESCOM at p. ¶ 17.

The Commission stated that its policy of preemption and deregulation of interstate satellite video signals was intended to promote free and open entry into the satellite communications field and "remove the government from one more area where the marketplace can make its own choices." Id.

* The use of a satellite dish ("S") to receive programming by a master antenna television system ("MATV") is the basis for the acronym "SMATV."

Both Orth-O-Vision and ESCOM clearly hold that state and local governments cannot regulate master antenna television systems that receive video programming by interstate radio signals--be they microwave or satellite signals. Rather, there must be some physical occupation of public streets by the system's equipment, e.g. cable, before any local interests justifying regulation are invoked. See discussion supra at pp. 15-16.

In adopting the Cable Policy and Communications Act of 1984 (the "Cable Act"), Congress stated it had no intention of disturbing the Commission's authority, jurisdiction or decisions regarding SMATV.

> [SMATV] systems are recognized as part of the broad band telecommunications network in this country under existing FCC policy. It is the intention of this legislation to further define FCC policy. Therefore, private cable systems continue to remain subject to the exclusive jurisdiction of the FCC.
>
> Senate Committee on Commerce, Science and Transportation, Report 98-67, 98th Congress, 1st Session 7 (the "Senate Report").

Just like the satellite signals in ESCOM and the MDS signals in Orth-O-Vision, 18 GHz will become one of the links in the interstate system of delivering video programming to consumers. As the Commission said in ESCOM:

> our precedent over the constituent elements of SMATV systems clearly indicates that we have, in fact, intended to preempt state regulation insofar as it frustrates the reception of satellite-transmitted signals
>
> ESCOM at ¶ 17.

The Commission should make clear in adopting the Rule that its preemption authority extends to 18 GHz when used as a "constituent element" in delivering SMATV service.

V. The Statutory Definition of a "Cable System" Should Not Include 18 GHz Microwave Transmitters or Transmissions

In adopting the Rule, the Commission can and should clearly state that 18 GHz transmission equipment and the transmissions themselves are not a "facility" as used in 47 U.S.C. § 522(6).* This statement will ensure that SMATV systems which use the 18 GHz Band do not become "cable systems."

A "cable system" is defined in the Cable Act as:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers in a community.
>
> 47 U.S.C. § 522(6).

In adopting the Cable Act, Congress intended that "cable system" should not include delivery systems using microwave technology. Thus "facility" was not intended to include intangible

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* The Commission has the authority to interpret "facility" in a manner consistent with the intent of the Cable Act. The Commission's interpretation is given great deference by the Courts so long as the interpretation does not expressly contradict the language of the statute. Ford Motor Credit Co. v. Cenance, 452 U.S. 155, 68 L.Ed.2d 744, 101 S.Ct. 2239 (1981). There is no provision in the Cable Act--express or implied--that requires microwave connected SMATV systems to obtain a municipal franchise.

satellite or microwave transmissions of video signals. Otherwise, individual C-Band earth stations, multichannel MDS ("MMDS"), MDS and direct broadcast service ("DBS") would be "cable systems" which Congress clearly did not intend.

"Facility" therefore encompasses only tangible property. This interpretation is supported by the reference to "a set of closed transmission paths" which the Commission has always described as cable or wire, First Report and Order in Docket No. 20561, 63 F.C.C.2d 956, 966 (1977) and "associated...equipment."

The tangible property used by to deliver satellite television programming to consumers consists of (1) a satellite uplink facility which transmits television programming from a videotape to (2) a satellite in geostationary orbit which in turn transmits the signal to (3) an earth station which processes the signal and distributes it by either (a) coaxial cable to the subscriber (as with cable systems) or (b) by microwave to a receiver which then in turn distributes the signal by coaxial cable to the subscriber (as with MMDS).

In this chain of satellite video distribution equipment, Congress intended to draw a line between the distributors subject to municipal franchise requirements--cable companies--and those who are not--e.g. MMDS and SMATV companies.

Congress clearly intended the coaxial cable link in the chain of distribution to be a "facility" by making the reference to "a set of closed transmission paths." And it is also equally clear that Congress did not intend uplinks and satellites to be a

"facility." Otherwise, DBS and all video C-Band satellites would, by definition, become a "cable system."

Reception equipment, such as an antenna, is a "facility" because it is physically connected to the cable and the "facility" definition specifically includes "associated signal...reception...equipment."

However, Congress did not contemplate or intend that any transmitter--satellite, broadcast, DBS, off-air or microwave--be part of the "cable system" definition. The word "transmitter" is notably absent from the "facility" definition.

To include microwave transmitters within the definition of "facility" would mean that MDS and MMDS become a "cable system." Congress obviously did not intend such an absurd result.

In adopting the Rule, the Commission should make clear that the term "facility" in the "cable system" definition does not include equipment used to transmit 18 GHz microwave signals or the signals themselves. This interpretation is logical, easy to apply, completely consistent with the Congressional purposes expressed in the Cable Act and in accord with Commission precedent. It should also be clearly stated that SMATV systems which interconnect using the 18 GHz Band do not thereby become "cable systems."

If the Commission were to make clear that 18 GHz transmitters and transmissions are excluded from the definition of a "facility", then SMATV systems could use an earth station to receive satellite signals at a building and also install an 18 GHz microwave transmitter at the same building and retransmit video signals to another second building without becoming a "cable

system." Since neither the 18 GHz microwave transmitter nor the transmissions are a "facility", their presence would not affect the status of the first building as an SMATV system.*

Nor would the 18 GHz transmitter or transmissions affect the status of the second building as an SMATV system. As with the first building, the only "facility" at the second building would be the reception equipment and physically connected cable. And since that "facility" serves subscribers only in the second building, 47 U.S.C. § 522(6)(B), the "SMATV exemption" applies.**

In adopting the Cable Act, Congress clearly said that the dividing line between federal and local regulation of video technology is the physical use of public streets by tangible property.

> [The Cable Act] seeks to restore the jurisdictional boundaries over cable to their more traditional positions. As pointed out by the FCC, "the ultimate dividing line, as we see it, rests on the distinction between the use of the streets and rights of way and regulation of the operational aspects of cable communications." The former is clearly within the jurisdiction of state and their political subdivisions, the latter, to the degree exercised, is within the jurisdiction of the

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* Physically connecting an earth station, which is a "facility," with a transmitter, which is not a "facility," does not create a "combination of facilities" pursuant to 47 U.S.C. § 522(6)(B).

** "Combination of facilities" as used in the SMATV exemption means physically connecting one "facility" with another in a manner that uses the public rights of way. "Combination" does not mean interconnecting by microwave. Otherwise, MDS and MMDS, which connect many "facilities" at many different multifamily properties and single family homes, would be a "cable system."

> Commission--Report and Order Docket No. 20772, 54 F.C.C.2d 855, 861 (1975).
>
> The Senate Report at p. 7.

It was also Congress' express intent that SMATV flourish and become a viable competitor to cable. See Senate Report at page 19. The SMATV use of 18 GHz does not physically use public rights of way. SMATV 18 GHz connections simply do not cross the "ultimate dividing line" from federal to state regulation.*

The Commission can and should adopt the Rule. In adopting the Rule, the Commission should state that SMATV will be allowed to use 18 GHz to interconnect systems without thereby becoming a "cable system" because the 18 GHz transmittersd and transmissions are not a "facility."

VII. Conclusion

The use of 18 GHz for SMATV interconnection is the next logical step on the path towards a truly competitive video marketplace. The course of the path has been clearly marked by the Commission policy to

> do away with redundant government regulation where the marketplace operates in the public interest....This lowers the economic and procedural barriers inhibiting unrestricted

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* The Federal Courts have held that, under the First Amendment, the only legitimate interest state or local governments have in regulating cable rests on the physical use of public streets. Group W Cable, Inc. v. The City of Santa Cruz, 669 F.Supp. 954 (N.D.Cal. 1987), reh. den. 679 F.Supp. 799 (N.D.Cal. 1987); Century Federal, Inc. v. City of Palo Alto, 648 F.Supp. 1465 (N.D.Cal. 1986), appeal dismissed ___ U.S. ___, 98 L.Ed.2d 480 (1988).

> competitive entry into the satellite field. And it removes the government from one more area where the marketplace can make its own choices.
>
> ESCOM at ¶ 16.

By using 18 GHz, Liberty and other SMATV companies will significantly improve their opportunity for competitive entry into the satellite field. The Commission should therefore adopt the Rule in a meaningful fashion.

The Commission should clearly state that, like MDS and satellite signals, 18 GHz signals are an integral part of the interstate communications network and that the use of 18 GHz by SMATV is subject to the preemptive jurisdiction of the Commission as expressed in ESCOM and Orth-O-Vision. The Commission should also clearly state that 18 GHz transmitters and transmissions are not a "facility" under 47 U.S.C. § 522(6).

LIBERTY CABLE, INC.

By _____
W. James MacNaughton

Dated: April 16, 1990

TO: Bruce McKinnon

FROM: Peter O. Price

DATE: February 26, 1992

SUBJECT: FCC Licenses and Procedures

In order to accurately audit what licenses Liberty has requested and which have been provided, I have asked Joe Stern to analyze the procedure. Please don't get diverted by the piles of paper arriving from Washington because they require an inordinate amount of time in order to log and maintain. You should concentrate upon the planning, installation and operation of our system without being distracted by the administration. Once Joe has audited our list of applications against the licenses received and set up a maintenance procedure going forward, we can bring the function into Liberty as an Engineering Department responsibility. We are clearly not ready for that step, so in the meantime I will ask Stern Telecommunications to coordinate the function with Todd Parriott and advise us on a weekly basis in the form of a standardized report.

cc: J. Stern
T. Parriott
J. Curbelo

EXHIBIT Stern 3
Date: 6/5/96
Reporter: David A. Kasdan

(23)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

EXHIBIT 9
Date: 5/28/96
Reporter: David A. Kasdan

In the Matter of LIBERTY CABLE COMPANY, INC.	)	
Application for Review of the Denial of the Wireless Telecommunications Bureau of a Request for Confidentiality Pursuant to Sections 0.457 and 0.459 of the Commission's Rules	)	No. 95M003 AFFIDAVIT OF LLOYD CONSTANTINE

LLOYD CONSTANTINE, being duly sworn, deposes and says:

1. I am a member of the law firm Constantine & Partners and an attorney duly admitted to practice law in New York State.

2. I make this affidavit to explain the genesis and preparation of the investigative report and audit concerning the procedures utilized by Liberty Cable Company, Inc. ("Liberty") to obtain Federal Communications Commission ("FCC" or "Commission") licenses for the operation of Liberty's microwave-based SMATV service in the 18GHz band (the "Investigative Report" or "Audit") which was provided to the Commission and in particular to Regina Keeney, the Wireless Telecommunications Bureau Chief, in a submission dated August 14, 1995.

3. In late April 1995, Liberty's Chairman, Howard Milstein, became aware that Liberty was providing service to customers in two buildings in New York City utilizing microwave paths that had pending, but not yet granted, applications before the FCC. My law firm and I (the "Firm") were retained to conduct an accelerated outside audit to ascertain whether Liberty had activated service on any other paths where a license application was then pending but had not been granted. In May 1995, the Firm ascertained that service had been initiated to a total of 15 buildings on microwave paths, where license applications were then pending but had not

been granted. This conclusion was reported to Mr. Milstein who directed it be disclosed to the Commission.

4. Mr. Milstein then retained the Firm to conduct the more extensive audit, the results of which were submitted to the Commission on August 14th and to prepare a "Compliance Program" to assure against future FCC licensing irregularities.

5. The Firm conducted the Audit in June, July and early August 1995. The Firm was given complete access to Liberty's books and records and an unfettered and unlimited opportunity to interview all Liberty personnel, officers and outside-retained counsel. The Firm utilized four attorneys, two paraprofessionals and ultimately also received investigative assistance from the law firms of Wiley, Rein & Fielding and Ginsberg, Feldman & Bress.

In all, this Firm alone devoted more than 500 hours of attorney and paraprofessional time to the Audit. As stated, Wiley, Rein and the Ginsberg, Feldman firms devoted many additional hours to the effort.

6. Because of the complete absence of restrictions on the Firm's ability to review documents and interview personnel and outside counsel, the Firm was able to discover errors which occurred in Liberty's licensing procedures and the reasons these errors occurred in a far more comprehensive, precise and accurate way than could any investigative agency. Contrasting the complete freedom which the Firm enjoyed conducting the Audit to any of the scores of grand jury and civil investigative demand investigations which I supervised as New York States chief antitrust prosecutor for ten years, I firmly and confidently conclude that neither the FCC nor any investigative body could have ascertained what the Firm did either in terms of its comprehensiveness nor its accuracy. This conviction is shared by the other principal investigators of the Firm, Robert Begleiter and Eliot Spitzer, who were, respectively, the former Civil Chief of the United States Attorneys Office in the Eastern District of New York and Chief

of the Labor Racketeering Bureau in the office of New York Country District Attorney, Robert Morganthau. The Audit also contains extensive information, material and documentation which are clearly privileged under the Attorney-Client and Attorney Work Product privileges and manifestly contains numerous mental impressions and opinions of the attorneys, of all three investigative firms, myself included. These mental impressions and conclusions of third-parties include harsh criticism such as the law firm of Pepper & Corazzini, who are not party to any FCC enforcement, and should not be exposed to public ridicule as a result of their cooperation with the Audit.

7. For these reasons, I concluded that the Audit results were confidential and should not be disclosed to the FCC unless they were afforded the confidential treatment to which they are entitled as a matter of law and so advised Liberty and its Chairman. This advice, in large part, relied upon the Commission's rule which provides that privileged information not be disclosed to the public, 47 C.F.R. § 0.457 (d), let alone to Liberty's competitor, Time Warner, who has established an extensive record of dissembling and distorting information for anti-competitive purposes. I also advised that consistent with 47 CF.R. § 0.459 such information may be returned to Liberty Cable Company, Inc. if confidential treatment was denied by the Commission.

Lloyd Constantine

LLOYD CONSTANTINE

Sworn to before me this
20 day of September 1995

Notary Public

LESLIE F. SPASSER
Notary Public, State of New York
No. 02SP5044966
Qualified in New York County
Commission Expires June 5, 1997

0048

Declaration Under Penalty of Perjury

I, Behrooz Nourain, depose and state as follows:

1. I am Director of Engineering for Liberty Cable Co., Inc. I do not believe that I provided a false affidavit in the course of this proceeding, nor has it ever been my intention to do so.

2. Time Warner alleges that, in light of statements I made in my February 21, 1995 affidavit, that my declaration submitted in connection with Liberty's Surreply, filed May 17, 1995, is false. That allegation is misplaced.

3. My February affidavit, which was submitted in order to correct misstatements made in an affidavit submitted by Time Warner, in large party addressed technical matters related to the distribution of video programming in the 18 GHz band. My February affidavit was submitted in connection with federal court litigation relating to Liberty's connection of certain non-commonly owned properties via cable utilizing private property ("Non-Common Systems") and whether those Non-Common Systems can constitutionally be classified as "cable systems" under the Cable Act.

4. Even prior to the commencement of the lawsuits, I was aware of allegations that Liberty's Non-Common Systems involved the provision of "cable service" without a local franchise. It had been decided that we should explore whether any of the Non-Common Systems could be served via 18 GHz microwave and if that were possible to obtain authorization to do so. I proceeded to set the process in motion by performing (or having performed under my direction) line of site studies; initiating the necessary prior coordination process; and, through counsel,